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IN THE

Supreme Court of the United States

October Term, 1969.

No. 1 0 .

THOMAS K. GILHOOL, et al.,

Appellants,

v.

CHAIRMAN AND COMMISSIONERS, PHILADELPHIA COUNTY BOARD OF ELECTIONS, et al.,

Appellees.

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

JURISDICTIONAL STATEMENT.

PAUL BENDER,
3400 Chestnut Street,
Philadelphia, Pa. 19104.

DONALD JOSEPH,
12th Floor, Packard Building,
Philadelphia, Pa. 19102.

Counsel for Appellants.

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

JURISDICTIONAL STATEMENT.

Appellants appeal from the order of the three-judge United States District Court for the Eastern District of Pennsylvania, entered on October 17, 1969, dismissing plaintiffs' complaint in this case and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW.

The opinion of the District Court for the Eastern District of Pennsylvania, constituting the court's findings of fact and conclusions of law, is not yet reported and is attached hereto as Appendix A, *infra*, p. 21.

JURISDICTION.

This action was brought under 28 U. S. C. secs. 1331 and 1343(3) to declare unconstitutional and to enjoin the requirement of the Election Code of the Commonwealth of Pennsylvania, 25 Purdon's Pa. Stat. Ann. sec. 3010(h), that a straight party lever be provided on voting machines. A three-judge district court was required to hear and determine the action under 28 U. S. C. sec. 2281. The opinion of the District Court was filed on October 14, 1969, judgment was entered on October 17, 1969, and a notice of appeal was filed in that court on November 12, 1969. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U. S. C. secs. 1253 and 2101(a). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *Moore v. Ogilvie*, 394 U. S. 814 (1969); *Hall v. Beals*, — U. S. —, 90 S. Ct. 200 (1969).

STATUTE INVOLVED.

25 Purdon's Pa. Stat. Ann. sec. 3010(h) requiring the use of straight party levers on voting machines, provides as follows:

> The names of all candidates of a political party shall appear in the same row or column, and no other

names shall appear in the same row or column, to the left or top of which shall be a straight party lever, by means of which an elector may, in one operation, vote for all the candidates of that political party for every office to be voted for. The names of such candidates shall be arranged under or opposite the title of the office for which they are candidates, and shall appear in the order of the votes obtained by the candidate for Governor of the party nominated at the last gubernatorial election, beginning with the party obtaining the highest number of votes: Provided, however, That in the case of parties or bodies not represented on the ballot at the last gubernatorial election, the names of the candidates of such parties shall be arranged alphabetically, according to the party or body name. The names of all candidates of a political body shall appear in the same row or column, and, if the number of parties and bodies permits, each political body shall be entitled exclusively to a separate row or column, with a straight party lever. If, however, the number of political parties and political bodies renders it impossible or impracticable to so arrange the political bodies, in such case said bodies shall not be entitled to a separate row or column and a straight party lever, but shall be listed by political appellations on the first left hand or top row with the designating letter and number of the ballot label where their candidates may be found, together with the political appellations of other political bodies, whose candidates may be interspersed on the same row or column. Subject to the aforesaid limitations, the form and arrangement of ballot labels, as to the placing thereon of political bodies, shall be within the discretion of the county board.

QUESTIONS PRESENTED.

1. Whether the requirement by the State that straight party levers be provided on all voting machines unconstitutionally discriminates against independent candidates and in favor of party candidates for the same office?

2. Whether, after the district court had denied appellants' application for a preliminary injunction on the ground that appellants' proof at the hearing on the application had failed to establish discrimination, the court erred in dismissing appellants' complaint for declaratory and permanent injunctive relief without giving appellants the opportunity to prove discrimination at the trial on the merits, when the court had never ordered the trial on the merits advanced and consolidated with the hearing on the application for preliminary injunction pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure (nor had the appellants stipulated to such a consolidation)?

STATEMENT.

Appellants are independent candidates for City Council in the City of Philadelphia (i.e., candidates not part of a party "ticket" presenting candidates for all or most of the offices to be voted for by electors) and voters who wish to elect them, or other independent candidates for City Council, to office (App. A, *infra*, p. 21). They brought this suit to challenge the requirement of the Pennsylvania Election Code, 25 Purdon's Pa. Stat. Ann. sec. 3010(h), that straight party levers be provided on voting machines at the top of each party column "by means of which an elector may, in one operation, vote for all the candidates of that political party for every office to be voted for." Appellants allege that this party lever requirement constitutes a serious discrimination against independent candidates for offices, such as City Council, which appear at a low position on the ballot, and in favor of candidates for such offices who run as part of a party ticket and that such discrimination is not justified by any sufficient governmental interest (App. A, *infra*, p. 24). Declaratory and preliminary and permanent injunctive relief was sought (Complaint, Para. 22, pp. 15-16).

The suit was brought on September 11, 1969, six days after elections for City Council in Philadelphia were called to take place on November 4, 1969 (App. A, *infra*, p. 21). Defendants (now appellees) are the officials charged with enforcement and application of the State Election Code provision relating to the form of the ballot. The Philadelphia County Democratic Executive Committee and the Republican City Committee, the two political organizations benefiting from the straight party lever requirement, were permitted to intervene as parties defendant (App. A, *infra*, pp. 23-24). A three-judge district court was convened and a hearing on appellants' application for preliminary injunc-

tion was held on September 24, 1969 and adjourned until October 6, 1969.[1]

On October 14, 1969, the district court denied appellants' application for preliminary injunctive relief on the ground that appellants had adduced "no testimony" at the hearing on the application for preliminary relief "to show that, where all parties and bodies had a straight party lever above their respective columns on the ballot, one desiring to vote for any of the independent candidates would in some way be deterred from so doing by the mere existence of a party lever appearing at the head of the Republican and Democratic columns." (App. A, *infra*, p. 27).[2] Studies of voter behavior presented to the court by appellants in the application for preliminary injunction showed, the court found, "that, in the elections studied, candidates appearing below the top of the tickets tend to get more votes in states where party levers are used than they do in states where party levers are not used," (App. A, *infra*, p. 28). These studies nevertheless were disregarded by the court on the

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1. The second hearing on appellants' application for preliminary injunction was required when, at the end of appellants' presentation of evidence of discrimination inherent in the proposed ballot on September 24, defendants announced that neither the form of the proposed ballot nor the accompanying instructions were yet final (App. A, *infra*, p. 25). The final prepared form of ballot was not presented to the court or appellants by defendants until the October 6 hearing. The final prepared ballot differed from that defendants originally prepared. (App. A, *infra*, pp. 25-27). No evidence as to discrimination in the ballot was received after the defendants' final proposal was submitted on October 6.

2. Appellants presented two expert witnesses at the hearing on the application for preliminary injunction. One witness stated his opinion that "the party levers would result in the regular party candidates getting more votes than they would get if party levers were not used"; this testimony was disregarded on the ground that it was "unsupported by reference to any persuasive data" (App. A, *infra*, pp. 27-28, n. 7). Appellants' other expert testimony was not persuasive, in the court's opinion, because "addressed to the original layout of the ballot, which, as we now know, will not be used in the November 4th election." (App. A, *infra*, p. 32).

grounds of hearsay and that the studies were concerned with different types of elections than those in Philadelphia for City Council and also on the ground that "none of the studies suggest that the well-informed, motivated voter would be in any way affected by the presence of party levers. They also tend to indicate that the removal of the party lever would discriminate against poorly educated voters by depriving them of an opportunity to vote for the candidates of their political party in a convenient way," (App. A, *infra*, p. 29). The court concluded "that the plaintiffs have failed to sustain their burden of proving that the use of party levers in this election attains the dimension of an 'invidious discrimination' proscribed by the Federal Constitution," (App. A, *infra*, p. 29).

Having concluded that appellants were not entitled to preliminary injunctive relief directed toward the November 4, 1969 election on the basis of the proof adduced by them at the hearing requesting preliminary relief, the court proceeded directly and finally to dismiss appellants' claims for declaratory and permanent injunctive relief as well (App. A, *infra*, p. 34). This action was taken despite the facts that the court had never acted under Rule 65(a)(2) of the Federal Rules of Civil Procedure to advance the trial on the merits and consolidate it with the hearing on the application for preliminary injunction and that appellants had never entered into a stipulation to that effect.

THE QUESTIONS ARE SUBSTANTIAL.

This appeal challenges the constitutionality under the First and Fourteenth Amendments of the requirement of the Pennsylvania Election Code that straight party levers must be provided on voting machines at all general elections within the State. Through such levers a voter wishing to vote a straight party ticket (i.e., to vote for all the candidates put up by a single party for all contested offices—local, state and national) may do so by pulling a single large party lever located at the head of each column of party candidates.[3] A voter not voting on the basis of party but wishing to allocate his votes among or between candidates of different parties for various offices, or a voter wishing to vote for any independent candidate not part of a party "ticket", may not cast his votes through use of a single large lever at the top of the voting machine, but must depress a number of individual levers next to the candidates of his choice. The official voting instructions in Pennsylvania emphasize straight party voting through party levers by listing and describing this form of voting first in the description of how to use the voting machines (App. A, *infra*, pp. 24-25, n. 5).

Appellants contend that the provision under State law of a special simple voting procedure, which may be used only by voters willing to vote for all the candidates of a single party, but not by voters wishing to vote for independent candidates or to vote for candidates regardless of their party affiliation, constitutes unjustifiable state

3. The Pennsylvania party levers are about five times the size of the levers next to individual candidates. Similar straight party levers are provided in several states, such as Connecticut (5 Conn. Gen. Stat. Ann. § 9-242) and Texas (9 Vernon's Civil Stat. of Texas Ann., Art. 7.14, § 8), while other states, such as New York (17 McKinney's Cons. Laws of N. Y. Ann. § 105), Minnesota (14A Minn. Stat. Ann. § 206.01), New Jersey (19 N. J. Stat. Ann. § 19: 48-1), and Massachusetts (2 Ann. Laws of Mass., C.54, § 33), have eliminated straight party levers from their voting process.

favoritism of party candidates and consequent discrimination against independent candidates for office. Such discrimination is contrary to this court's holding in *Williams v. Rhodes*, 393 U. S. 23, 31 (1968), that heavier mechanical burdens may not be imposed upon independent political candidates or their supporters than upon party candidates, unless such burdens are supported by "compelling state interest."

1. The case is not moot. The case was brought to prevent the use of straight party levers at the November 4, 1969, elections for City Council in Philadelphia. Although that election is over, the Pennsylvania Election Code continues to require the presence of straight party levers on all voting machines. Moreover, the time period available in which to challenge this provision immediately prior to each election where it applies, after all candidates have been qualified and the form of ballot established, is insufficient to permit full judicial consideration, including appellate review. The case is thus on all fours with *Moore v. Ogilvie*, 394 U. S. 814 (1969), where, as here, the case was not moot because the challenged practice under State law was "capable of repetition, yet evading review." Compare *Hall v. Beals*, — U. S. —, 90 S. Ct. 200 (1969), where the Court, two Justices dissenting, held a challenge to a state election provision moot because the challenged law had been changed and the plaintiffs' status had changed so that they no longer were adversely affected by the law. Here, all independent candidates and their supporters will continue to be affected at every future election so long as the Election Code continues to require straight party levers. In addition, the class of plaintiffs here consists, not only of particular candidates at the 1969 election and their supporters, but also of persons generally supporting independent candidates for office (See Complaint, Para. 7, p. 4). The interest of these

plaintiffs in the outcome of the case is not in the least diminished by the occurrence of the 1969 election.

2. Party levers required by state law constitute a substantial governmental discrimination against independent candidates. These levers provide an especially simple, fast and convenient form of voting, but this means of voting is available only to persons wishing—or willing—to cast all their votes for the candidates of a single party ticket. Party levers do not provide convenience for voters inclined to vote for independent candidates or for candidates of different parties for different offices. That is, there are no single levers available in the voting machines to select combinations of candidates from different parties, or to select combinations of independent candidates with party candidates. Single lever voting is available only to persons engaging in voting by party affiliation.[4]

Through providing party levers, therefore, the State makes one way of selecting candidates for whom to vote—that of selecting all the candidates of a single party—the simplest, fastest and most convenient way to vote. Such special State facilitating of a particular way of selecting candidates for whom to vote, which aids only candidates running as part of a party ticket, is, we submit, a clear violation of the requirement of *Williams v. Rhodes, supra*, that the State not favor party candidates over independents absent a "compelling justification". While *Williams* dealt only with discriminations toward independents seeking admission to the ballot, clearly the same principle applies to

4. The District Court stated that because all independent candidates were also given a large lever in the instant case, "there is even less disadvantage to the independent candidates than there was in the *Voorhees* (sic) case," (App. A, p. 31). The large lever serves no function in voting for a candidate who runs independently—not as part of ticket with candidates for all offices. In the present case, for example, the party lever registered choices for twenty offices whereas use of the large lever for appellant registered a choice for but one office.

bar discrimination favoring party candidates in the voting process itself.

The discriminating impact inherent in the provision by the State of special levers for straight party voting, which cannot be used by voters selecting candidates regardless of party, can most easily be seen by considering what the situation would be if the State provided a party lever for only one party, but not for others with candidates on the ballot. Such selective provision of a convenient way of voting simultaneously for all the candidates of one favored party—but not for the candidates of other parties—would certainly be deemed an impermissible State discrimination among parties. The provision of levers to facilitate all straight party voting works, we believe, an exactly identical discrimination, except that the discrimination here is not among parties but in favor of all party candidates and against all independents.

Discrimination occurs since voting for candidates because they are on the ticket of one's party preference is but one basis for voter choice; it is equally permissible to vote for candidates regardless of party affiliation because of individual merit. Independent candidates who do not run as part of a party ticket must rely exclusively upon the latter type of voter—that is, one who votes for individual candidates on their own merits rather than for all the candidates of one party—for their support. When the State provides an especially easy way to vote for candidates by party it biases the voting process in favor of voting for candidates by party. This discriminates against independent candidates, for whom one cannot vote by party, just as forcefully as it would discriminate against Republican candidates if the voting machine were set up to provide a single lever for voting by party only for Democratic candidates, requiring individual voting for all candidates of the Republican and other parties.

3. Voting machines incorporating the straight party lever not only constitute a state favoritism towards a basis of voting which cannot apply to independent candidates, it also inevitably affects the number of votes an independent candidate for lower office actually receives *vis-à-vis* his party counterpart. The use of a straight party lever actually changes the vote which will be cast as compared with the vote which would be cast on machines which do not employ such a lever.[5]

The bias occurs in a number of ways. In the first place, because of time and other pressures, voters not very strongly motivated toward particular candidates of different parties are encouraged to adopt straight party voting, if a party lever is available to them, simply because it is the easiest way to vote. This effect is documented by Campbell and Miller in "The Motivational Basis of Straight and Split Ticket Voting", 51 American Political Science Review 293 (1957). This study considered the discrepancy in the popular vote for President Eisenhower and for Congressmen in the 1956 elections:

> Whatever relationships we find between the political motivations of the voters and the way they mark their ballots, *it is clear that the form of the ballot itself has an influence on the proportion of straight and split tickets cast.* This becomes evident when we divide our sample into those voting in states with the single choice

5. The challenge to Connecticut's straight party lever in *Voorhees v. Dempsey*, 231 F. Supp. 975 (D. Conn. 1964), affirmed without opinion, 379 U. S. 648 (1965), did not raise the issue presented here. The complaint in that case did not allege, nor did the jurisdictional statement assert, nor of course was there any proof, that the straight party lever changed votes. Indeed, the only issue raised by the class of voters plaintiffs in *Voorhees* was that voting for independent candidates was more time consuming and required more effort. That case did not even pose the question of association, here raised by plaintiffs independent candidates and their supporters, and, after *Voorhees*, held decisive in *Williams v. Rhodes*.

> type of straight ticket voting and those in which a straight ticket requires more than one mark on the ballot. Of the Eisenhower voters in the single choice states, 59 per cent voted a straight ticket; in the other states it was 48 per cent. Of the Stevenson voters in the single choice states, 69 per cent voted a straight ticket; 60 per cent voted a straight ticket in the multiple choice states. Since the distributions of party identifiers in the two types of states do not differ we must conclude that *the sheer ease of voting a straight ticket facilitates this type of voting. Id.* at 299, 300. (Emphasis supplied.)

An analysis of 1964 data showed the same patterns concerning split tickets as were found in the 1956 data. Walker, "Ballot Forms and Voter Fatigue, An Analysis of the Office Block and Party Column Ballots," 10 Midwest Journal of Political Science 448, 450 (1966).

Another result of the straight party lever is to give a "bonus" vote to party candidates that they would not ordinarily receive. The reason for this is simply that voters who do not utilize a straight party lever often tire or otherwise do not vote for the lower offices unless they are strongly motivated to do so. A large "fall off" in votes results toward the bottom of a ballot where party levers are not available:

> The number of expressions of opinion demanded of the American voter constitutes a greater burden than is borne by any other voter in the world. The ballot is so long, in fact, that the voter waives and often refrains from voting on offices or measures toward the bottom. Not uncommonly, as many as 25 to 30 percent of those voting fail to make a choice on obscure constitutional amendments, and the less conspicuous offices almost invariably attract a far lower vote than do the offices at

the head of the ticket. In the larger states these partial nonvoters may number in the hundreds of thousands.

V. O. Key, *Politics, Parties, and Pressure Groups*, 646 (5th ed. 1964).

On the other hand, where the straight party lever is available, voters using such levers automatically vote for all of a party's candidates down to the bottom of the ticket, thus eliminating any "fall-off" for such party voters. This kind of bonus vote cannot go to independent candidates at the bottom of a ticket who receive only those votes intentionally cast for them by the pulling of their individual levers.[6]

The district court found that discrimination had not been shown by appellants because it found no evidence that well-informed, motivated voters would be deterred from voting for independent candidates by straight party levers or otherwise have their vote affected. (See Statement, *supra*, p. 7.) We do not quarrel with the finding that the well-informed or strongly motivated voters would vote identically whether or not party levers were present. The fact is, however, that because of the factors just described, voters of marginal motivation will have their votes affected by the presence of straight party levers. A significant number of these voters would split their tickets—or vote for independent candidates—if the significantly easier way of voting "straight party" were not available. Other marginally motivated voters would not vote at all for lesser offices if party levers were not present; with party levers they vote for such offices, but only for party candidates for such offices. This effect of party levers upon voters of low

6. This discrimination and the unreasoned, bonus vote it brings to party candidates bear especially in contests for office in local government, for such elections are characteristically ranged at the bottom of the ballot. *Cf. Avery v. Midland County*, 390 U. S. 474 (1968).

or marginal motivation is also documented by Campbell and Miller:

> For the extreme party identifiers (Strong Republicans and Strong Democrats), the ballot form has no discernible effect on whether or not they vote a straight ticket. Strong Republicans using multiple choice ballots still vote a straight ticket just as frequently as do Strong Republicans who can cast a party vote with a single "X" or by pulling a single party lever; the same is true of Strong Democrats. Among weak identifiers, Independents, and among identifiers whose presidential vote is in conflict with their party identification, the form of the ballot plays a progressively more and more important role in facilitating or inhibiting straight ticket voting. Campbell and Miller, at 307.

They conclude

> The fact that the American ballot system permits the voter to choose an entire party slate with a single decision, and in a large proportion of the cases with a single movement of a pencil or voting machine lever, introduces an additional factor into the explanation of the vote. If the voter were compelled to go through the individual positions on the ballot, making independent decisions on each one separately, we would expect the unmotivated voter to be very unlikely to vote a straight ticket. Not being guided by any general political motive according to which he could organize the entire ticket he would presumably be influenced by a variety of unrelated considerations that would take him haphazardly from one side of the ballot to the other. The fact is, however, that we find a substantial number of straight tickets among voters who seem to have no partisan commitment to either parties, candidates, or issues. To explain their presence in our

> data we must invoke a second motivational principle, *the tendency toward least effort*. We conclude that in the absence of relevant political motivation, these people are voting a straight ticket *because* the peculiarities of the voting system make a straight ticket vote the easiest way for them to complete the task of voting. The more the ballot form facilitates the marking of a straight ticket, the more likely they are to choose this alternative. Campbell and Miller, at 311. (Emphasis supplied).

See also Campbell, Converse, Miller and Stokes, *The American Voter* (1960), wherein are gathered the definitive voter studies of the Survey Research Center of the University of Michigan.

Such discrimination against independent candidates through effects upon the votes cast by a significant portion of voters (perhaps even a majority) who do not enter the voting booth with strong motivation toward particular candidates or parties, is constitutionally impermissible unless justified by a strong counterbalancing governmental interest.

4. The only justification ordinarily suggested for the use of the straight party lever is that it simplifies and speeds up the voting process. The difficulty with this rationale is that the straight party lever simplifies and speeds up the process only for voters wishing to vote a straight party ticket. It is this very fact which causes its effect upon the votes cast by marginally motivated voters. The State, we believe, is not entitled to introduce for reasons of administrative convenience a device which makes the voting process simple and quick only for voters selecting party candidates. In such circumstances administrative convenience does not constitute a compelling interest. *Carrington v. Rash*, 380 U. S. 89 (1965); *Rinaldi v. Yeager*, 384 U. S. 305 (1966); *Shapiro v. Thompson*, 394 U. S. 618 (1969).

The party lever is not necessary in order to enable voters who wish to do so to vote a straight ticket. The party affiliation of candidates is clearly marked on the ballot and, in addition, Pennsylvania places all candidates of a given party in the same column thus further facilitating straight party voting by those who wish to vote a straight ticket. This ballot form arguably serves a legitimate purpose of helping voters easily to identify party candidates for whom they may wish to vote, while, not, in and of itself, making it easier to vote a straight ticket than a split ticket. On the other hand, the straight party lever serves no necessary purpose of clarifying the ballot for voters, while its favoritism toward straight party voting biases the vote against independent candidates.

In one situation there might be a strong—perhaps a compelling—state interest on the side of favoring party candidates for lower offices in the manner achieved by party levers in Pennsylvania. If an election involved the choice of a full "team" of elected officials to govern a political unit, a governor and members of the legislature, for example, or a mayor and city councilmen, one might argue that the benefits of having full cooperation among the elected officials would permit a State to encourage the election of persons all or most of whom belonged to the same party. Party levers might thus be justified as an attempt to encourage voters to choose members of the same party and to elect a unified slate to govern. But the Pennsylvania Election Code is not so narrowly drawn; it permits, indeed requires, the use of the straight party lever to join contests for offices in no way rationally related to each other. There is no conceivable basis for the State to encourage the election of persons from the same party to the posts of Supreme Court Judge and Philadelphia City Council, as the party levers did in November, and will continue to do.

5. Not only was the application for preliminary relief denied below but the complaint was dismissed forthwith, for the court "concluded that plaintiffs have failed to sustain their burden of proving that the use of party levers attains the dimension of an 'invidious discrimination' proscribed by the Federal Constitution," (App. A, *infra*, p. 29). If the dismissal rested on the judgment that even if the factual burden had been carried by appellants no cause of action was stated, there is substantial question, as we have urged above, that the dismissal was error. If, on the other hand, the dismissal rested on the judgment that appellants had failed to carry their factual burden, appellants were prematurely denied the opportunity of proof, and the cause should be remanded for trial on the merits. The court had never acted under Rule 65(a)(2) to advance the trial on the merits and consolidate it with the hearing on preliminary injunction and appellants had never entered into a stipulation to that effect.

Appellants are, in fact, prepared to offer substantial additional expert testimony and evidence showing the discriminatory effect of straight party levers against independent candidates for lessor offices, should such a showing be deemed necessary to demonstrate the unconstitutional effect of straight party levers in this case. Such evidence, much of it from expert academic witnesses located at a considerable distance from the place of the hearing, could not be presented to the court in the short period between the defendants' finalization of the form of ballot for the November 4, 1969 election and the last date on which the district court could have effectively ordered a change in the November, 1969, ballot.

CONCLUSION.

The questions presented by this appeal are substantial. Probable jurisdiction of the appeal should be noted or, in the alternative, the order of the court below should be vacated and the cause remanded for trial on the merits.

Respectfully submitted,

PAUL BENDER,
DONALD JOSEPH,
Counsel for Appellants.

APPENDIX A.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

CIVIL ACTION NO. 69-2139.

THOMAS K. GILHOOL, ET AL.

v.

CHAIRMAN AND COMMISSIONERS, PHILADELPHIA COUNTY BOARD OF ELECTIONS, ET AL.

OPINION OF THE COURT

Before KALODNER, *Circuit Judge*, HIGGINBOTHAM and MASTERSON, *District Court Judges*

MASTERSON, *J.*

Plaintiffs brought this action to enjoin the City of Philadelphia "from preparing or utilizing voting machines or ballots employing straight party voting levers for the offices of Councilman in the First and Seventh Councilmanic Districts in the special elections to be held in those Districts in Philadelphia on November 4, 1969, or from conducting the election in any other manner causing discrimination against independent candidates for Councilman, their supporters, or electors wishing to vote for such candidates."

The plaintiffs are residents and electors of the First and Seventh Councilmanic Districts of the City of Philadelphia. The purpose of the special election in question is to fill vacancies which have occurred in the office of councilman in these districts. Pursuant to writs of election issued on September 5, 1969, by the President of City

Council, the special elections are scheduled to be held in conjunction with the regular municipal election on November 4, 1969.

In their complaint, the plaintiffs requested the convening of a district court of three judges on the ground that the injunctive relief sought would restrain the enforcement, operation and execution of state statutes of state-wide application, namely, the Election Code of the Commonwealth of Pennsylvania, as amended, 25 Purdon's Pa. Stat. Annot. §§ 2787 and 3010(h).[1] Pursuant to 28 U. S. C. § 2281,[2] a

1. Section 2787 provides:

Every special election, held under the provisions of this article, shall be held and conducted in all respects in accordance with provisions of this act relating to November elections, and the provisions of this act relating to November elections shall apply in so far as applicable, and not inconsistent with any other provision of this act. All such special elections held at the time of a regular primary or November election shall be conducted by the election officers by the use of the same equipment and facilities, so far as practicable, as are used for such primary or November election.

Section 3010(h) provides:

The names of all candidates of a political party shall appear in the same row or column, and no other names shall appear in the same row or column, to the left or top of which shall be a straight party lever, by means of which an elector may, in one operation, vote for all the candidates of that political party for every office to be voted for. The names of such candidates shall be arranged under or opposite the title of the office for which they are candidates, and shall appear in the order of the votes obtained by the candidate for Governor of the party nominated at the last gubernatorial election, beginning with the party obtaining the highest number of votes: Provided, however, That in the case of parties or bodies not represented on the ballot at the last gubernatorial election, the names of the candidates of such parties shall be arranged alphabetically, according to the party or body name. The names of all candidates of a political body shall appear in the same row or column, and, if the number of parties and bodies permits, each political body shall be entitled exclusively to a separate row or column, with a straight party lever. If, however, the number of political parties and political bodies renders it impossible or impracticable to so arrange the political bodies, in such case said bodies shall not be entitled to a

three judge court was convened and a hearing was scheduled for September 24, 1969. Prior to the hearing, motions to intervene as party-defendants were made by the Philla-

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separate row or column and a straight party lever, but shall be listed by political appellations on the first left hand or top row, with the designating letter and number of the ballot label where their candidates may be found, together with the political appellations of other political bodies, whose candidates may be interspersed on the same row or column. Subject to the aforesaid limitations, the form and arrangement of ballot labels, as to the placing thereon of political bodies, shall be within the discretion of the county board."

2. For section 2281 to be applicable, the following requirements must be fulfilled:

(1) a state statute must be challenged;

(2) a state officer or local officer performing a state function must be a party defendant;

(3) injunctive relief must be sought;

(4) it must be claimed that the statute is contrary to the Constitution.

There is no problem in this case with requirements (1), (3) and (4). The Pennsylvania Election Code is a state statute of statewide application and the plaintiffs are seeking injunctive relief, claiming that certain Election Code provisions are violative of the First and Fourteenth Amendments to the Federal Constitution. The problem is with the second requirement—that the parties-defendant be state or local officers performing a state function.

The named defendants here are the Philadelphia County Board of Elections and its Chairman and Commissioners. The Board is established pursuant to state law (25 Purdon's Statutes § 2641) and its powers and duties are defined by state law (25 Purdon's Statutes § 2642). It is clear under the decided cases that, whether these officials be denominated as state or local officers, the crucial issue for the purpose of deciding whether a three judge court should be convened is whether these officials are performing a local or state function in carrying out the actions which the plaintiffs seek to enjoin. See, e.g., *Moody v. Flowers*, 387 U. S. 97 (1967); *City of Cleveland v. United States*, 323 U. S. 329 (1945); *Spielman Motor Sales Co. v. Dodge*, 295 U. S. 89 (1935). Since plaintiffs are here attacking the use of a straight party lever which is required to be used pursuant to the State Election Code, and since the ballot for November 4th includes elections for both statewide and local offices, we have concluded that the defendants are performing a state function when they place a straight party lever on the voting machines. Hence, they are state officers within the meaning of 28 U. S. C. § 2281.

delphia County Democratic Executive Committee and the Republican City Committee and the motions were granted by the Court.[3]

At the initial hearing, the plaintiffs' complaint was three-pronged: (1) they averred that the use of a straight party lever, which permits a voter to vote for all the candidates of a party by turning a single large lever above the column in which the party's candidate appears, unconstitutionally favors the major parties and results in a discrimination against candidates of other political parties and bodies; (2) plaintiffs also contended that the physical layout of the ballot allegedly proposed for the special election in the First Councilmanic District discriminated against the so-called independent candidates since all the independent candidates' names were arranged vertically on the far right side of the ballot, whereas the major parties' candidates for the same office would appear horizontally on the left of the ballot;[4] (3) plaintiffs further complained that the instructions to the voters appearing at the bottom of the ballot in recent elections,[5] and presumably those same instructions would be employed in this election, were mislead-

3. Pursuant to 28 U. S. C. § 2284, the Governor and Attorney General of the Commonwealth of Pennsylvania were given adequate notice of the hearing and, in fact, were represented at the hearing.

4. The question whether all the political parties and bodies could be provided with separate vertical columns on the ballot resolved itself into one of physical possibility, for the City of Philadelphia only had voting machines which could accommodate up to nine columns. This did not present a problem in the Seventh Councilmanic District where only nine political parties or bodies had filed for ballot position. However, in the First Councilmanic District, 11 parties or bodies had filed for the election and, if all were unchallenged, it could occasion the type of ballot layout of which the plaintiffs complain.

5. These instructions, in pertinent part, appeared as follows on the face of the ballot:

INSTRUCTIONS TO VOTER

FIRST OPERATION—Turn Voting Switch to Right which will Close Curtain and will Unlock Machine so you can vote.

ing since they appeared to state that the voter would have to vote a straight party ticket before he could "split" his vote for candidates of other parties.

At the conclusion of the first hearing, it was readily apparent that this Court could not decide the issues presented because the facts were in an unsettled state. More specifically, the defendants advised the Court that the physical layout of the ballot would not be finally determined until the state courts ruled on challenges lodged against parties which had filed for ballot position in the First Councilmanic District for the November 4th election. The outcome of these challenges would be the controlling factor as to whether all the political parties would have their own vertical columns on the ballot so as to allow candidates for a particular office to appear on the same horizontal plane across the ballot. The defendants also agreed to have the plaintiffs participate in the drafting of new voter instructions with the intention that the new instructions would be acceptable to all. In light of these developments, the initial hearing was adjourned until such time as the final format of the ballot could be determined.

On October 6, 1969, another hearing was held. At this time, the defendants stated to the Court that of the 11 political parties and bodies that had filed for ballot position in the First Councilmanic District the state courts had sustained objections to three of the bodies and that the County Board of Elections had rejected the nominating papers of a fourth body. Consequently, only 7 political parties and

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5. (cont.)

SECOND OPERATION—TO VOTE A STRAIGHT PARTY TICKET.—Turn large lever at top of Party Column until X marks appear to the right of the names of all Candidates.

THIRD OPERATION—TO VOTE A SPLIT TICKET.—After turning down Party Lever, turn up Lever opposite the Candidate's name you wish to cut out. Then turn down Lever to the right of the name of any Candidate for the SAME OFFICE.

bodies remain on the ballot in the First Councilmanic District. The defendants also stated that the 9-column voting machines will be used in this District, thus providing each party and body with their own vertical column and party lever and allowing all candidates for a particular office to appear on the same horizontal plane on the face of the ballot. Similar arrangements are planned for the Seventh Councilmanic District where we have been told that not more than eight political parties and bodies will appear on the ballot. However, these procedures did not satisfy the plaintiffs who reiterated their objections to the presence of straight party levers, irrespective of the fact that these levers were now provided for all the political parties and bodies. The plaintiffs also complained that the "spatial gaps" which appeared on the ballot discriminated against their candidates. These "gaps" are the result of the failure of two parties (whose columns separate the two major parties on the left of the ballot from the independent bodies on the right of the ballot) to run candidates for the office of Councilman in the First District.

At the October 6th hearing, the defendants also presented to the Court the revised voting instructions[6] which

6. In pertinent part, these instructions will appear on the November 4, 1969 ballots as follows:

INSTRUCTIONS TO VOTER

1. Turn Voting Switch to Right Which Will Close Curtain and Will Unlock the Machine for Voting.
2. TO VOTE

a) You may vote a straight party ticket by pulling down and to the left, the large lever at the top of the Party Column until X marks appear to the right of the names of all Candidates of that party.

OR

b) You may vote a split ticket either by turning down the small individual levers to the right of each candidate for whom you wish to vote until an X mark appears to the right of the name of each candidate.

would appear on the ballots. These also were objected to by the plaintiffs who contended that it would be more logical to have the instruction for "splitting" a ticket come before the instruction which explains how to vote a straight party ticket.

Plaintiffs contend that notwithstanding the apparent equality of treatment on the face of the ballot, in that all parties and bodies now have their own vertical columns and party levers, the mere presence of party levers will cause voters who would otherwise vote for independent candidates to "shift" their votes to candidates of the major political parties. However, we find that the plaintiffs have failed to meet their burden of proof in this regard as no testimony was adduced to show that, where all parties and bodies had a straight party lever above their respective columns on the ballot, one desiring to vote for any of the independent candidates would in some way be deterred from so doing by the mere existence of a party lever appearing at the head of the Republican and Democratic columns.

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6. (cont.)

OR

You may turn down a party lever, then turn up the lever of candidate or candidates of that party for whom you do not wish to vote, and then turn down the lever of any other candidate FOR THE SAME OFFICE for whom you do wish to vote.

OR

c) To vote for a person whose name does not appear upon the ballot labels, release lever at the extreme left hand side of the machine, pull out slide of the office for which you wish to vote, and write name of person of your choice.

* * *

7. Neither of the plaintiffs' witnesses presented any evidence, statistical or otherwise, of such "a shift". Plaintiffs' witness Cooper was not familiar with any study comparing voting patterns in elections where party levers were used to those elections where they were not used (N. T. p. 54). He speculated that in his opinion the party levers would result in the regular party candidates getting more votes than they would get if party levers were not used, since many voters who might have difficulty with the voting machines, would take the

In the absence of such evidence, plaintiffs have urged the court to take judicial notice of several studies of voter habits which they contend support their theory that the use of a party lever causes a "voter shift".[8] This court has concluded that these studies are not properly before the court since they have not been identified by any witnesses as standard reference works and none of the experts who testified commented as to these specific studies either as to the authors' methodology or the accuracy of their results. In addition to this technical objection, however, a reading of the studies reveals that they simply do not support plaintiffs' claim. First, none of the studies were directed to the question of whether or not, in an election such as the one before the court, the mere presence of the party lever in and of itself would cause voters to shift their votes from independent candidates to the candidates of a major party. On this critical question, the studies are entirely silent. Secondly, the only tangible fact reported by these studies appears to be that, in the elections studied, candidates appearing below the top of the tickets tend to get more votes in states where party levers are used than they do in states where party levers are not used. The authors offer various hypotheses to explain this phenomenon, including voter confusion, voter fatigue, disinterest in the lower offices appearing on the ballot and a tendency to use the line of least resistance and vote for party affiliation when that can be

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7. (cont.)

line of least resistance and pull down the party lever of their own party (N. T. pp. 57-59). Cooper's testimony was entirely unsupported by reference to any persuasive data and is entitled to very little weight. In any event, it does not support the plaintiffs' theory of a "voter shift".

8. See Walker, *Ballot Forms and Voter Fatigue: An Analysis of Office Block and Party Column Ballots* in 10 Midwest Journal of Political Science 448 (1966); Campbell & Miller, *The Motivational Basis of Straight and Split Ticket Voting* in 51 American Political Science Review 293 (1957); Campbell, Converse, Miller & Stokes, *The American Voter* (1960).

done easily. None of the studies suggest that the well-informed, motivated voter would be in any way affected by the presence of the party levers. They also tend to indicate that the removal of the party lever would discriminate against poorly educated voters by depriving them of an opportunity to vote for the candidates of their political party in a convenient way.[9]

In the case at bar, a voter wishing to vote for an independent candidate for City Council has just as many ways of voting for that candidate as he has for voting for a candidate of one of the regular political parties. He can turn either the large party lever at the top of the column in which the candidate's name appears or he can use the smaller lever opposite the candidate's name. Hence it will not be substantially more difficult, as plaintiffs claim, to vote for an independent candidate for City Council than for a candidate of one of the regular political parties. Accordingly, this court has concluded that the plaintiffs have failed to sustain their burden of proving that the use of party levers in this election attains the dimension of an "invidious discrimination" proscribed by the Federal Constitution.

The Election Code of Pennsylvania makes it mandatory to have party levers on voting machines. It is set out at 25 Purdon's Pa. Stat. § 3007 that:

> "No voting machine shall . . . be approved by the Secretary of the Commonwealth . . . unless it shall, at the time, satisfy the following requirements:
>
> * * * * *
>
> (b) It shall permit each voter, at other than primary elections, to vote a straight political party ticket in one operation . . . to vote for all the candidates for one political party for every office to be voted for, except those offices as to which he votes for individual candidates.

9 See Walker, 450, 462.

(c) It shall permit each voter, at other than primary elections, to vote a ticket selected from the nominees of any and all political parties, from the nominees of any and all political bodies, and from persons not in nomination."

See *Leoni v. Philadelphia*, 90 D. & C. 2d 706 (1956); *Petition To Set Aside Special Election in the 32nd Senatorial District*, 15 D. & C. 2d 271 (1958).

The constitutionality of a single party lever was considered by a three judge court in the case of *Voorhees v. Bronson*, 231 F. Supp. 870 (D. Conn. 1964), aff'd 379 U. S. 618, 13 L. Ed. 2d 692. That case involved a Connecticut mandatory party lever statute where the machines were arranged so that it was necessary to pull a party lever to unlock the machine in order to vote. In holding that the statute did not deprive non-partisan voters of any constitutional right, the Court said:

"The mandatory party lever statute does not deny any candidate a place on the ballot, nor does it prevent any voter from voting for any candidate. A vote for a straight ticket is accorded no greater weight in the final tallies than a vote for a split ticket. While the wisdom of the mandatory party lever statute may be questionable, it can hardly be said to be fundamentally unfair or unreasonably discriminatory in contravention of the Fourteenth Amendment. Indeed, the disadvantaging inconvenience to the voter [under the Connecticut statute would appear to be much less than the New Jersey statute considered by a three judge court in Vellucci v. Gaynor, 232 F. Supp. 62 (D. C. N. J. 2d 1964)] in overcoming the obstacle to straight ticket voting is the opportunity to cast his vote for candidates on the ballot with the top group of candidates.

> "The utilization of party levers, be they optional or mandatory, discriminates against the independent voter to the extent the latter must spend more time and effort to vote for the same number of candidates than one who votes for a straight ticket. However, there is a rational basis for this discrimination, for the party lever simplifies and speeds up the voting process for large numbers of voters. . . . We are unable to see that the slight extra effort required for an independent voter to pull a party lever and reject candidates for whom he does not care to vote constitutes such a burdensome and unreasonable discrimination that the independent voter is deprived of the equal protection of the laws.

In the case at bar, there is even less disadvantage to the independent candidates than there was in the *Voorhees* case since any voter desiring to vote for such a candidate can do so by either turning the party lever at the head of the column in which the candidate's name appears or by pulling the lever which is next to his name.

Plaintiffs urge that the Supreme Court's affirmance of the *Voorhees* result should be ignored because it has been "undermined" by *Williams v. Rhodes*, 393 U. S. 23 and *Moore v. Ogilvie*, 394 U. S. 814, 818. We do not read those cases as undermining the result in *Voorhees*. In *Williams*, the court found that Ohio's election laws were so laced with restrictions as to make it virtually impossible for any party to qualify on the ballot except the Democratic and Republican parties. In *Moore*, the court voided an Illinois statute which made it impossible for the voters in 49 counties, representing 93.1% of the registered voters in the state, to form a new political party and place its candidates on the ballot. Both decisions rested on the principle that election laws which make it difficult or impossible for independent

parties or candidates to be placed on the ballot violate the Equal Protection Clause of the Federal Constitution because they have the effect of denying the franchise to many of the citizens of the states involved. There is no such problem here. All of the candidates who desire to be on the ballot are on the ballot, and there is no mechanical advantage given to any of the parties or candidates. Hence plaintiffs' reliance on *Williams* and *Moore* is misplaced.

Plaintiffs' second contention is that the "gap" between the Republican and Democratic columns on the left of the ballot (Columns A and B) and Columns E, F, and G on the right of the ballot (Mr. Gilhool appears in Column G) unconstitutionally discriminates against the candidates in Columns E, F, and G (see the Appendix). The basis for plaintiffs' contention is a theory known as the "law of proximity". There was expert testimony at the first hearing that the separation between the major party candidates, listed horizontally and in separate columns on the left of the ballot, and the independent candidates, listed vertically in one column on the right, on the visual field of the ballot, could deceive the voter into believing that the two groups were different and that the only candidates for the council manic election were the major party candidates on the left. This, it is said, will cause the independent candidates to lose votes, even if a voter originally intended to vote for an independent candidate when he entered the voting booth. The testimony of the expert was addressed to the original layout of the ballot, which, as we now know, will not be used in the November 4th election. Notwithstanding the changes in the set up of the ballot, however, plaintiffs urged at the second hearing that the "law of proximity" still applied, and that although the effect of the alleged prejudicial positioning of the columns arising from the operation of the "law of proximity" had been materially diminished by the new ballot layout, they had not been eliminated.

We find that the plaintiffs have also failed to sustain their burden of proof on this issue. Even if this "spatial gap" discriminates against independent candidates, there is no evidence as to the extent and magnitude of the alleged discrimination. The "gap" exists because the Constitutional Party in Column C and the American Independent Party in Column D have failed to run candidates for any office. Under the Pennsylvania Election Code, (25 Purdon's Statutes §2937), these two parties have a right to be on the ballot and voters may write in candidates in their columns. They are positioned between the party candidates and the independent candidates pursuant to the Pennsylvania Election Code and not at the whim of the Board of Elections. Under Section 201(f)(5) of the Election Code, the order of the parties from left to right on the ballot is dictated by the number of votes received by a party's candidate in the last gubernatorial election. The party whose candidate received the largest number of votes in that election is placed in Column A on the extreme left, the party receiving the next highest total is placed in Column B and so forth. If a party was not represented in that election, then it is listed alphabetically after those which were represented, beginning with the next available column to the left of the ballot and working towards the right. This statute reasonably and fairly arranges the parties on the ballot and cannot be considered unconstitutional merely because of the coincidence that two parties have not run any candidates.

Lastly, plaintiffs attack the voting instructions, claiming that they favor straight party voting to the prejudice of independent candidates. The original instructions have been changed and most, if not all, of the alleged bias has been overcome by the new instructions (See footnotes 5 and 6, *supra*). It has now been made clear to the voter that he need not first pull a party lever before "splitting" his vote among other candidates. Hence, the instructions neither

unjustifiably encourage voters to use straight party levers nor do they tend to confuse or dissuade voters from voting for independent candidates.

In view of our holding that plaintiffs' proofs with respect to the conduct of defendants in the scheduled Special Election to fill vacancies in the offices of Councilman in the First and Seventh Councilmanic Districts in the City of Philadelphia, Pennsylvania, have failed to establish that such conduct attains the dimension of "invidious discrimination" proscribed by the Federal Constitution, the Complaint is dismissed and an Order dismissing the Complaint will be entered.

What we have said above constitutes our Findings of Fact and Conclusions of Law.

ORDER.

AND NOW, to wit, this 14 day of October, 1963, it is ORDERED that plaintiffs' Complaint, in the above entitled matter, be and the same is hereby DISMISSED.

AND IT IS SO ORDERED.

HARRY E. KALODNER.
Harry E. Kalodner,
Circuit Judge.

A. LEON HIGGINBOTHAM.
A. Leon Higginbotham,
District Judge.

THOMAS A. MASTERSON.
Thomas A. Masterson,
District Judge.

APPENDIX

VOTING MACHINE SAMPLE BALLOT

GENERAL MUNICIPAL AND SPECIAL ELECTION, TUESDAY, NOVEMBER 4, 1969

28th WARD

Election District

	Republican Column A	Democratic Column B	Constitutional Column C	American Independent Column D	Consumers Column E	Peace Freedom Column F	Voters Action Column G	Column H	Question	Question
									YES	
									NO	
									YES	
									NO	
									YES	
									NO	
									Judicial Retention	Judicial Retention
									YES	
									NO

IN THE

Supreme Court of the United States

FEB 12 1970
JOHN F. DAVIS, CLERK

October Term, 1969 No. 1069

THOMAS K. GILHOOL, et al., *Appellants*,

v.

CHAIRMAN AND COMMISSIONERS, PHILADELPHIA COUNTY BOARD OF ELECTIONS, et al., *Appellees*.

MOTION TO DISMISS OR AFFIRM

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

EDWARD R. BECKER,
12 S. 12th Street,
Philadelphia, Pa. 19107
WILLIAM AUSTIN MEEHAN,
Girard Trust Building,
Philadelphia, Pa. 19102
Counsel for Appellee,
Republican City Committee
ISADORE A. SHRAGER
FOX, ROTHSCHILD, O'BRIEN and FRANKEL,
1401 Walnut Street,
Philadelphia, Pa. 19102
Counsel for Appellee,
Philadelphia Democratic County Executive Committee

THE LEGAL INTELLIGENCER, 69 NORTH JUNIPER STREET, PHILA., PA. 19107

MOTION TO DISMISS OR AFFIRM

Appellee, Republican City Committee, moves the Court to dismiss the appeal herein on the grounds that the case is moot and that a three-judge Court should not have been convened, or, in the alternative, to affirm the judgment of the United States District Court for the Eastern District of Pennsylvania on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to warrant further argument. Appellee Democratic City Committee joins in this Motion.

QUESTIONS PRESENTED

Where the principal Appellant was an "independent" candidate for the office of Philadelphia City Councilman at a special election held on November 4, 1969, and his candidacy, which was unsuccessful, was placed upon the voting machine under the name "Urban Action Party" in a party column equipped with a straight party lever in the same manner as the major party candidates, and where the actual factual record of the case developed at a preliminary injunction hearing is barren of any competent probative evidence tending to show that the presence of a straight party lever discriminates against independent candidates in favor of major party candidates:

(1) Is the case moot?

(2) In view of the local nature of the election, should a three judge Court have been convened?

(3) In view of the absence of evidence of the effect of the party lever upon voting habits and of the numerous factors which demonstrably justify it as an appropriate subject of State policy, can Appellants successfully claim that the requirement that straight party levers be provided on all voting machines constitutes invidious discrimination?

against independent candidates and in favor of party candidates for the same office?

(4) Did the Lower Court act correctly in dismissing the Complaint rather than holding a full trial on the merits, even though one was never requested, and the relief sought in the Complaint was limited to the November 4, 1969 election?

STATEMENT OF THE CASE

Appellants are residents and electors of the First and Seventh Councilmanic Districts of the City of Philadelphia. Two of them, Gilhool in the First District and Hackett in the Seventh District, were candidates for the office of City Councilman at special elections held to fill vacancies in that office in conjunction with the regular Municipal Election on November 4, 1969. That election has been concluded and the successful candidates have been sworn into office and seated in the Council.[1] No challenge to the outcome of the two special elections was filed.

The gravamen of Appellants' Complaint is that the Pennsylvania Election Code, 25 Purdon's Pa. Stat. Ann. Sec. 3010 (h), providing for straight party voting, invidiously discriminates against Appellants as candidates (and voters) in favor of candidates running as part of a party ticket. Under the aegis of Section 3010 (h), straight party levers are required on voting machines at the top of each party column by means of which an elector may, in one operation, vote for all the candidates of that political party for every office to be voted for.

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1. The vote in the First District was: William B. Cottrell (Republican) 23,254; Natale F. Carabello (Democratic) 14,916; Thomas K. Gilhool (Urban Action) 5,183; Leonard W. Galloway (Consumer) 622; and Craig C. William (Black Panther) 277. Appellant Hackett did not even appear on the ballot because her nomination petition was stricken by the Court of Common Pleas as defective. She appealed that decision to the Pennsylvania Supreme Court, January Term, 1970, No. 170-71, but ultimately withdrew the appeal.

In their Complaint Appellants sought "declaratory" as well as preliminary and permanent injunctive relief, however, neither in the Complaint, nor anywhere during the course of the proceedings was reference to the Declaratory Judgment Act made. The Court below treated the case as one seeking purely injunctive relief.

The suit was brought on September 11, 1969, six days after the special election had been called. The original defendants, the Chairman and Commissioners of the Philadelphia City Commissioners (now Appellees) are the officials responsible for the setting up of the voting machines, and the conduct of the election. Pursuant to Appellants' request, a three-judge District Court was convened. The Philadelphia Republican City Committee and the Philadelphia County Democratic Executive Committee were then permitted to intervene as parties defendant. A hearing on Appellants' Application for a Preliminary Injunction was held on September 24, 1969. A continued hearing was held on October 6, 1969.

The first hearing produced some 142 pages of notes of testimony which have been certified as part of the record. The focal point of the hearing was a voting machine (N.T. 18) which was present in the courtroom and towards which the vast bulk of the testimony was referenced. Appellants produced two allegedly expert witnesses, Robert S. Cooper and Professor Julius Wishner,[2] to attempt to establish that the arrangement of the face of the voting machine in evidence discriminated against Appellants.

At the core of Appellants' case were certain detailed hypothetical questions which were asked these "experts" (see N.T. 56, N.T. 104-108). These questions were based upon: (1) the ballot arrangement on the face of the machine which was present in the courtroom, and (2) a voter

2. Neither witness was accepted as an expert by the Court below (See, inter alia, Appellants Appendix A-p. 27, footnote 7). The Court, for instance, permitted Cooper's testimony for "whatever limited value it might have" (N.T. 55).